

IN THE SUPREME COURT OF THE STATE OF DELAWARE

REALTY ENTERPRISES, LLC	§	
	§	No. 188, 2010
Appellant	§	
Defendant Below,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
PATTERSON-WOODS &	§	C.A. No. 05C-01-224
ASSOCIATES, LLC,	§	
	§	
Appellee	§	
Plaintiff Below,	§	
	§	
v.	§	
	§	
ANTHONY G. BARIGLIO and	§	
TODD W. BARIGLIO,	§	
	§	
Appellee	§	
Third Party Defendant Below.	§	

Submitted: September 24, 2010

Decided: December 13, 2010

Before **HOLLAND, JACOBS**, and **RIDGELY**, Justices.

***ORDER***

This 13th day of December 2010, it appears to the Court that:

(1) This is an action to recover commissions due to a real estate broker under a Listing Agreement. Defendant-Below/Appellant, Realty Enterprises, LLC (“Realty”), appeals from a Superior Court jury verdict in favor of Patterson-Woods & Associates, LLC (“PW”) in the amount of \$3,675,570.30. Realty raises five

arguments on appeal. First, Realty contends that the Superior Court erred in allowing the jury to award damages for brokerage commissions on both the sale and the lease of a property. Second, Realty contends that the Superior Court erred in dismissing Realty's third party complaint against Anthony and Todd Bariglio. Third, Realty contends that the Superior Court erred in precluding Realty from raising a jurisdiction issue. Fourth, Realty contends that the Superior Court erred in failing to reduce PW's damages to present day value and in allowing speculative damages. Fifth, Realty contends that the Superior Court erred in precluding Realty from presenting relevant evidence. We find no merit to Realty's appeal and affirm.

(2) All of PW's claims arise from the execution of an Exclusive Right to Sell, Lease or Sub-Lease Listing Agreement (the "Listing Agreement") on October 29, 2002. The Listing Agreement between Realty and PW required PW "to procure a person, corporation or other entity to purchase, lease or sublease" the property located at 611 Valley Road, Hockessin DE (the "Property"). At the time the Listing Agreement was executed, the Property was owned by Realty. Anthony Bariglio, vice president of PW, signed as "agent" for PW. Both Anthony and his brother, Todd Bariglio, performed services pursuant to the Listing Agreement.

The relevant provisions of the Listing Agreement are as follows:

1. In consideration of the services of Patterson Woods & Associates, LLC . . . the undersigned ( . . . hereinafter referred to as "Owner"), hereby engages Broker as Owner's sole and exclusive agent for a period of one year . . . to procure a person,

corporation or other entity to purchase, lease or sublease the above described property at the price and on the terms and conditions set forth above or under such other terms, price or conditions as Owner may accept. . . . If notice is not given this Agreement shall automatically renew upon the same terms and conditions as set forth above. In the event Owner does not refer any, and all inquiries for lease/sale, or transfer of any kind from his property, and if Owner shall attempt to finalize, or close an Agreement with an undisclosed person or company, Broker shall still be paid a full commission in accordance with the Commission Schedule.

2. If the property is withdrawn from sale or lease, leased, subleased, or if any part of the ownership is transferred, gifted, conveyed, or sold, through any source (and whether or not the Owner does so directly) during the term of this agreement or any extension thereof, Owner agrees to pay Broker a fee in accordance with the attached Schedule of Commission Rates and Fees.

20. If legal action is instituted by either party with respect to this agreement, the prevailing party shall be reimbursed immediately for all actual attorney's fees and expenses incurred by the other party.

(3) Anthony and Todd Bariglio (acting as PW agents), introduced Realty to Morgan Ventures, LLC ("Morgan"). According to Realty, the Bariglios never told them that Morgan was their business partner in multiple real estate ventures. Further, Realty alleged that Todd Bariglio "fraudulently induced" Eileen DeFelice of Realty into executing promissory notes in favor of Morgan by falsely claiming "that the Colt Stream LLC Agreement required her to execute these notes." These facts formed the basis of Realty's third party claim against the Bariglios.

(4) In August 2003, Realty and Morgan formed a new entity, Colt Stream, LLC (“Colt Stream”). On January 13, 2004, as a result of the efforts of Anthony and Todd Bariglio, Colt Stream signed a lease (the “CS Lease”) with Happy Harry’s, Inc. (“HH”). The relevant portions of the CS Lease are as follows:

[22.] (G) Broker’s Commission-Each of the parties represents that Todd Bariglio [] is the only broker involved in the consummation of this lease agreement and that there are no claims for brokerage commissions or finder’s fees in connection with this Lease other than that due Bariglio.

[31] (B) This lease is contingent upon Landlord obtaining legal title to the Entire Premises.

(5) Before the Property was ever transferred to Colt Stream, Morgan and Realty’s relationship deteriorated. Morgan filed an action against Realty in the Court of Chancery. The Bariglio brothers and PW were not parties to that action. In a letter dated July 12, 2004, Realty’s counsel assured HH’s counsel that Realty would honor the CS Lease “in whatever form the real estate ownership might ultimately take – whether by Colt Stream or by Realty Enterprises, L.L.C. if Colt Stream is dissolved.”

(6) On September 10, 2004, the parties signed and filed a settlement agreement in the Court of Chancery. On October 8, 2004, the parties executed a release, which relevantly provides:

11. Pursuant to paragraph 14 of the Term Sheet, the DiFelice Parties, on the one hand, and the Morgan Parties, on the other hand, hereby mutually remise, release, and forever discharge

each other from all manner of actions . . . of whatever nature, in law or in equity, which they ever had or now have, whether known or unknown, anticipated or unanticipated, through the date of the Term Sheet, other than as set forth in the Term Sheet and this Release, and other than any claims that Todd Bariglio or Patterson-Woods may have for the commission stated in the Happy Harry's Lease and any claims that the DiFelice Parties may have with respect to non-payment of such commission.

(7) Three other relevant events took place on October 8, 2004. First, a Certificate of Cancellation was filed for Colt Stream. Second, Realty and Cockeysville Partners, LLC ("Cockeysville") joined together to form Valley-Limestone Development, LLC ("VL"). Third, Realty deeded the Property to VL. Realty and Colt Stream then assigned the CS Lease to VL.

(8) Thereafter, VL and Ralph Larson of HH began to discuss the creation of a new lease for the Property. On January 25, 2005, before a new lease was executed, PW filed its initial complaint in the Superior Court naming only Realty as defendant and claiming commissions owed arising from the transfer of the Property to VL.

(9) In September 2005, VL and HH executed a new lease for the Property for a term of 25 years with five possible extensions of 10 years. The terms contained in the VL lease are nearly identical to those contained in the CS Lease, with one significant difference: the "Broker's Commission" provision contained in

the CS Lease does not appear in the VL lease. The parties replaced that provision with the following language:

Each party represents to the other that no broker has been involved in this transaction. It is agreed that if any claims for brokerage commissions or fees are ever made against LANDLORD or TENANT in connection with this transaction, all such claims shall be handled and paid by the party whose actions or alleged commitments form the basis of such claim. It is further agreed that each party agrees to indemnify and hold harmless the other from and against any and all such claims or demands with respect to any brokerage fees or agents' commissions or other compensation asserted by any person, firm, or corporation in connection with this AGREEMENT or the transactions contemplated hereby.

In 2006, HH began constructing a building on the Property. In January 2007, HH began to pay rent to VL under the VL lease.

(10) On July 7, 2006, PW filed an amended complaint in the Superior Court that also asserted claims against VL and HH. VL and HH settled their claims with PW prior to trial, and the Superior Court dismissed Realty's third party complaint against the Bariglio brothers. PW's claims against Realty were decided at a jury trial in the Superior Court. The jury found in favor of PW and awarded it \$3,675,570.20. This appeal followed.

(11) Realty contends that the Superior Court erred in allowing the jury to award damages for brokerage commissions on the transfer *and* the lease of the Property. Realty argues that a verdict in PW's favor entitled PW to commission

for *either* the transfer *or* the lease of the Property, *not both*. “Challenges to a jury’s verdict may not be raised for the first time on appeal.”<sup>1</sup> Realty did not move to challenge the jury verdict in the Superior Court, so we review Realty’s claim for plain error.<sup>2</sup> Realty accepted the Superior Court’s plan for presenting the damages issue to the jury. The following exchange is illustrative:

THE COURT: “[T]he instructions give the jury the option of selecting both [the lease commission and the transfer commission] or one.”

REALTY’S COUNSEL: Right. And that’s fine. I think it’s clear that they’re only entitled to one, not two. But that’s something for the jury, then ultimately the Court, to decide.

Accordingly, Realty has not shown reversible error because it does not point to an error “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>3</sup>

(12) Realty also contends that the Superior Court erred in dismissing Realty’s third party complaint against Anthony and Todd Bariglio. We review this claim for abuse of discretion.<sup>4</sup> A party waives a claim where the party does not plead it in the pretrial stipulation.<sup>5</sup> Realty filed a third-party complaint against the Bariglio brothers, but did not raise any claims against the Bariglio brothers in the

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<sup>1</sup> *Kiana v. K-Mart Corp.*, 700 A.2d 736, 1997 WL 537174, at \*1 (Del. 1997) (TABLE) (citing *Weiner v. Wisniewski*, 213 A.2d 857, 859 (Del. 1965)).

<sup>2</sup> *See id.*

<sup>3</sup> *See Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 832 (Del. 1995).

<sup>4</sup> *Sammons v. Doctors for Emergency Svcs., P.A.*, 913 A.2d 519, 528 (Del. 2006).

<sup>5</sup> *See Alexander v. Cahill*, 829 A.2d 117, 128–29 (Del. 2003).

pretrial stipulation. Therefore, the Superior Court did not abuse its discretion in dismissing Realty's third-party complaint.<sup>6</sup>

(13) Realty next contends that the Superior Court erred in rejecting Realty's jurisdiction challenge raised four days before the start of trial. We review this claim for abuse of discretion.<sup>7</sup> Delaware Superior Court Rule of Civil Procedure 9(a) provides that "[if] a party desires to raise an issue as to the legal existence of any party, or the capacity of any party to sue or be sued, or the authority of a party to sue or be sued in a representative capacity, the party shall do so by specific negative averment." Realty did not comply with Rule 9(a) and only argued that PW lacked capacity four days before trial and sixty-two months after the litigation commenced. In its answers to PW's complaint and first amended complaint, Realty admitted that PW was a commercial real estate broker and did not assert an affirmative defense that indicated otherwise. Consequently, Realty waived the affirmative defense of lack of capacity.<sup>8</sup> The Superior Court did not abuse its discretion in rejecting this claim.

(14) Realty also contends that the Superior Court erred in failing to reduce PW's damages to present day value and in allowing damages based on HH's unexercised lease options. Realty did not raise this claim in the Superior Court, so

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<sup>6</sup> *See id.*

<sup>7</sup> *See Sammons*, 913 A.2d at 528.

<sup>8</sup> *Cf. Abdi v. NVR, Inc.*, 945 A.2d 1167, 2008 WL 787564, at \*2 (Del. 2008) (TABLE).



we review Realty's claim for plain error.<sup>9</sup> The parties included an acceleration clause in the Listing Agreement, which provided for accelerated payment of commissions based upon "[a] tenant completing the existing term and exercising all options to renew and extend [the] lease."<sup>10</sup> Here, HH signed a lease that included renewal options. The jury awarded PW with damages based upon HH's unexercised options, and this award comported with the Listing Agreement to which the parties agreed. Accordingly, Realty has not shown reversible error because Realty does not point to an error "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."<sup>11</sup>

(15) Finally, Realty contends that the Superior Court erred in precluding Realty from presenting relevant evidence. Specifically, Realty argues that the Superior Court precluded it from presenting evidence related to the Court of Chancery litigation involving Morgan and Realty, even though it allowed PW to do so. But Realty makes no specific allegations of how the exclusion of the evidence prejudiced it. In any event, we review rulings on the admission of evidence for abuse of discretion, which occurs when a court has exceeded the bounds of reason

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<sup>9</sup> See *Kiana*, 700 A.2d 736.

<sup>10</sup> The acceleration clause provided: "In the event the commission amount is not paid (and received by Broker) within 30 days of the due date Broker shall have the right to accelerate the balance of all future commissions based upon the tenant completing the existing term and exercising all options to renew and extend this lease and all such future commissions plus accumulated interest in the amount of 1.5 percent of the outstanding balance per month shall become due and payable at once upon demand."

<sup>11</sup> See *Duphily*, 662 A.2d at 832.

in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice.<sup>12</sup> The Superior Court admitted relevant evidence related to the Morgan-Realty litigation, but precluded Realty from introducing irrelevant details. The Superior Court explained:

[The Morgan-Realty litigation] was a red herring. It is only in this case to explain the sequence of events. . . . There was a separate litigation in Chancery of which we know something, obviously. But to get into that litigation is irrelevant. If relevant at all, and it's not, it certainly has the clear risk of substantially outweighing any relevance by confusion, misleading, and whatever. . . . It's only there because it helps to explain the sequence of events in this case. That's its relevance.

In excluding evidence not relevant to this action, the Superior Court did not exceed the bounds of reason in view of the circumstances. Because the Superior Court carefully admitted relevant evidence and excluded irrelevant evidence, and because Realty does not specifically identify any prejudice, we cannot conclude that the Superior Court abused its discretion.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice

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<sup>12</sup> See *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).